

A Partnership Including
Professional Corporations
600 13th Street, N.W.
Washington, D.C. 20005-3096
202-756-8000
Facsimile 202-756-8087
<http://www.mwe.com>

Boston
Chicago
London
Los Angeles
Miami
Moscow
Orange County
New York
St. Petersburg
Silicon Valley
Vilnius
Washington, D.C.

McDERMOTT, WILL & EMERY

Robert S. Schwartz
rschwartz@mwe.com
202-756-8081

September 5, 2000

VIA ECFS

Ms. Magalie R. Salas
Federal Communications Commission
Office of the Secretary
445 12th Street, SW
Washington, D.C. 20554

Re: Written *Ex Parte* Presentations; In the Matter of Compatibility Between Cable Systems and Consumer Electronics Equipment; PP Docket No. 00-67; In the Matter of Implementation of Section 304 of the Telecommunications Act of 1996; Commercial Availability of Navigation Devices; CS Docket No: 97-80

Dear Ms. Salas:

This is to notify the Office of the Secretary that on September 5, 2000, on behalf of Circuit City Stores, Inc., Robert S. Schwartz of McDermott, Will & Emery delivered the attached written *ex parte* presentation to: Chairman Kennard, Commissioner Furchtgott-Roth, Commissioner Ness, Commissioner Powell, and Commissioner Tristani; William J. Friedman IV, Senior Legal Advisor to Commissioner Tristani, David Goodfriend, Legal Advisor to Commissioner Ness, Paul Jackson, Special Assistant to Commissioner Powell, Karen Edwards Onyeije, Legal Advisor to Chairman Kennard, Mark Schneider, Senior Legal Advisor to Commissioner Ness, and Helgi Walker, Senior Legal Advisor to Commissioner Furchtgott-Roth; Deborah Lathen, William Johnson, Deborah Klein, Steven Broeckert and Thomas Horan of the Cable Services Bureau; Robert Pepper, Amy Nathan and Jonathan Levy of the Office of Plans & Policy, and Dale Hatfield, Alan Stillwell and Bruce Franca of the Office of Engineering & Technology. Circuit City's written *ex parte* presentation responds to the August 25, 2000 *ex parte* letter filed by the Motion Picture Association of America.

In accordance with Section 1.1206 of the Federal Communications Commission rules, this letter and the written presentation is being provided to your office. A copy of this notice has been delivered to the parties listed above.

Very truly yours,

/s/ Robert S. Schwartz

Robert S. Schwartz

cc: Chairman Kennard
Commissioner Furchtgott-Roth

September 5, 2000

Page 2

Commission Ness
Commissioner Powell
Commissioner Tristani
William J. Friedman IV
David Goodfriend
Paul Jackson
Karen Edwards Onyeije
Mark Schneider
Helgi Walker
Deborah Lathen
William Johnson
Deborah Klein
Steven Broeckart
Thomas Horan
Robert Pepper
Amy Nathan
Jonathan Levy
Dale Hatfield
Alan Stillwell
Bruce Franca
Neal Goldberg – National Cable Television Association
Fritz Attaway – Motion Picture Association of America

*Circuit City Stores
September 5, 2000*

**Response To MPAA Assertions
Re DFAST License**

In its *ex parte* letter of August 25, the MPAA makes several incorrect assertions with respect to the purpose and status of the "DFAST" license.

(1) *That the DFAST license covers "components used in the cable television industry"*

The assertion that the subject of the DFAST license is "components used in the cable television industry" betrays a fundamental misapprehension of the *law* pursuant to which the draft DFAST license is being created, as well as of CS Docket 97-80.

The law, Section 304 of the Telecommunications Act of 1996, was enacted to bring competition to the market for Navigation Devices, as elements of freely marketed consumer electronics and information technology products. In short, Congress's purpose was to *free* this functionality from competitive confinement within cable industry supply channels.

Drafts of the DFAST to date have been objectionable precisely because they would re-establish an arbitrary monopoly over design, configuration, and distribution of these products. For 50 years, competitive entrants have been denied any share of the Navigation Device market because, out of concern for their vulnerability to theft of service, Federal and state laws prevented them from being sold competitively. Their design, manufacture, and distribution were all closed to competition, as they remained "components used in the cable television industry."

In enforcing Section 304, the Commission required separation of the vulnerable security circuitry onto POD modules, and declared a "right to attach" for the freely competitive host devices. A limited measure of re-encryption, involving DFAST technology, was added to private sector specifications voluntarily, in response to pleas of MPAA and its members. It would be ironic indeed if the fact that this late measure, which involves use of a patented technique, were now to be construed by the Commission as erecting of a *new, blanket monopoly* over Navigation Devices -- in place of the one that Congress told the Commission to abolish.

MPAA's mischaracterization of the DFAST license, as addressing only "cable industry components," explains its expectation that the cable industry -- the incumbent monopolist -- should have free reign, for the benefit of MPAA program suppliers, to restrain, restrict, and dictate the design of all competitive entrant downstream devices.¹

(2) *That FCC rules "clearly permit the DFAST license" to impose content owners' "exclusive rights" on competitive manufacturer licensees*

MPAA continues to pretend that Par. 63 of the Navigation Device R&O addresses *license restraints* rather than areas of *specification*. That paragraph discusses several technologies that might be implemented in Navigation Devices that, for purposes of the FCC's distinctions between the C/A circuitry to be isolated on PODs, and other circuitry to reside in hosts, are not classified by the Commission as "conditional access."² This paragraph does not at all address the question of what, if any, *license restraints* may be imposed on those who implement such copy protection, non-C/A technology. It was precisely this sort of ancillary *license* imposition that the Commission, as it did in its Part 68 rules, guarded against in its regulations.

The R&O formulation as to *license* constraints could not be clearer -- the only permissible subjects for *license* constraint are "harm to the network" and "theft of service." The restraints in the draft DFAST license, however, go well beyond even enforcement of the particular encryption means referenced in par. 63. They would include (a) non-transmission, over a home network, of HDTV signals for which consumers have paid (and as to which there is no dispute about their authorization to view), and (b) restrictions on the attachment of recording devices.³

Nowhere is it written in U.S. law that downstream consumer electronics, information technology or telecommunications devices must be designed to conform to "exclusive rights" of signal proprietors. (There is certainly no right, to be implied from "conditional access," to interrupt authorized viewing of HDTV signals.) The Commission should not broaden its regulations so as to approve such a doctrine, especially when its congressional mandate is to free an industry from existing monopoly constraints.

* * *

¹ MPAA's claim that its members have nothing to do with the attempt to impose such restrictions is belied by the direct reference to the MPAA request in the extant draft of the DFAST license.

² If the specified technology were classified as "conditional access," under FCC rules its use would have to be limited to the POD module and not the host device.

³ See *Circuit City ex parte* filing of August 24, 2000.

If the FCC is to consider modifying its regulations so as to allow *license restraints* based on the permitted encryption specification, it should not do so in the manner -- requested by MPAA -- that would re-impose the monopoly over Navigation Device functions that Congress instructed the Commission to break up. That is the entire point of manufacturer and retailer reaction to the draft DFAST license. It explains why (according to NCTA) *only* "cable industry component" supplier Scientific Atlanta has purported to sign some version of this draft license -- 2 days ahead of the Commission's July 1 deadline for cable industry support of competitive entry.